(2)

No. 88-21-41

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

HARVEY H. TODA,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU,
a Municipal Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent City and County of Honolulu (hereinafter referred to as "City") believes that the question presented to the Court for review is whether the Ninth Circuit was correct in its decision to affirm the district court's summary judgment for the City on the issues of regulatory taking, procedural due process, infringement of contractual rights and conspiracy.

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RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is an appeal by Plaintiff from the Ninth Circuit's affirmation of the Court's Order Granting Defendant's Motion for Summary Judgment. The action arises out of the downzoning of vacant unimproved real property identified as lot number 1 of the "Sunset View Lots" tract situated on Welelau Place, Aiea Heights, State of Hawaii, and containing an area of 203,844 square feet. Plaintiff purchased the real property in 1963 as tenants by the entirety with his wife. In November 1942 the parcel was zoned "AA" residential by Resolution No. 81 of the City and County of

Honolulu. Under the 1969 Comprehensive Zoning Code of the City and County of Honolulu, Ordinance No. 3234, the parcel was rezoned "R-3" residential. Subsequently, in 1981, the Development Plan for the Primary Urban Center, *i.e.*, the area from Waialae-Kahala to Pearl City (Ordinance No. 81-79), designated the parcel "Preservation," and in 1982 the zoning for the entire parcel was downzoned to "P-1" preservation by the adoption of Zoning Map No. 7, which encompassed the area from Halawa to Pearl City (Ordinance No. 82-62), in accordance with the said Development Plan designation.

Thereafter, by amendment of the Development Plan for the Primary Urban Center in 1985 (Ordinance No. 85-46) and amendment of Zoning Map No. 7 in 1986 (Ordinance No. 86-133), a one-acre portion of the parcel was upgraded to a residential designation and "R-10" residential zoning, respectively. The balance of the parcel retains a preservation designation and zoning.

Defendant provided notification of its intention to adopt the Development Plan for the Primary Urban Center, Ordinance No. 81-79, and Zoning Map No. 7, Ordinance No. 82-62, by newspaper publication.

In 1986, the Land Use Ordinance, Ordinance No. 86-96, effective October 22, 1986, superseded in its entirety the provisions of the Comprehensive Zoning Code, Ordinance No. 3234. The Land Use Ordinance renamed the "P-1" preservation zoning of the subject parcel to "P-2" preservation.

Defendant is a duly constituted municipal corporation of the State of Hawaii. Plaintiff is a resident of the City and County of Honolulu, State of Hawaii, and no diversity of jurisdiction was alleged.

Jurisdiction of the District Court was invoked by Plaintiff on the grounds of federal question. In his Complaint, Plaintiff alleged violations of rights guaranteed to him under the provisions of the United States Constitution, specifically (1) the right against infringement of contracts, (2) the right to due process of law, and (3) the right to just compensation. Complaint, p. 2, ¶¶ 1 and 2 of "Complainant." With respect to the right to just compensation, Plaintiff alleged that the downzoning of the subject parcel based upon the slope of the land was arbitrary and capricious, and discriminatory in that other parcels of land with similar slopes were not downzoned. Plaintiff alleged that the subject parcel may have

been downzoned to depress the value of the land to the Defendant's benefit for future acquisition as a sewage pump station site.

With respect to the right against infringement of contracts, Plaintiff alleged that State statute, Hawaii Revised Statutes ("HRS") Section 46-4 (Appendix A at 1a), together with the 1949 deed for the conveyance of the subject parcel to Plaintiff's predecessor in title, guaranteed to Plaintiff the residential zoning of the subject parcel established in November 1942 by Resolution No. 81. With respect to the right to due process of the laws, Plaintiff alleged that Defendant failed to notice him of the consideration of the subject parcel for downzoning prior to the enactment of the applicable Development Plan and zoning ordinances in violation of the Fourteenth Amendment of the Constitution and of City and County of Honolulu Ordinance No. 84-111, effective December 7, 1984, which requires notification by mail to property owners affected by a development plan land use map amendment.

On September 8, 1987 and prior to the District Court's entertainment of the argument on Defendant's Motion for Summary Judgment and Dismissal of Complaint, the Court received two stipulations withdrawing several of Plaintiff's claims in the suit. By stipulation submitted by Defendant, Plaintiff withdrew claims against Defendant as to (1) denial of equal protection of the laws guaranteed by the United States and Hawaii Constitutions, (2) violation of City and County of Honolulu Ordinance No. 84-111, and (3) denial of just compensation guaranteed by the United States and Hawaii Constitutions. By stipulation submitted by Plaintiff, Plaintiff withdrew claims against Defendant as to (1) family intrusion created by the case against owners, and (2) 1987 zoning regulations without exemptions but conspiracy charges pending its completion in State of Hawaii, Tax Appeal Court.

The trial of the lawsuit in the District Court was scheduled to commence at 9:00 a.m. on September 9, 1987.

REASONS FOR DENYING THE WRIT

I.

MR. TODA'S PETITION FOR CERTIORARI FAILS TO PRESENT ANY SUBSTANTIAL OR IMPORTANT REASONS FOR REVIEW OF THE CIRCUIT COURT'S DECISION

Rule 17.1 of the Rules of the Supreme Court of the United States provides that a "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." While the rule does not specifically address what constitutes "special and important" reasons to support a writ of certiorari, the rule does provide some guidelines to indicate the "character of the reasons that will be considered" by the Court. These guidelines include:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision;
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals;
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

None of the above reasons, however, are present in this Petition filed with this Court.

II.

NO IMPORTANT QUESTION OF FEDERAL LAW WAS DECIDED BY THE NINTH CIRCUIT, NOR DID THE NINTH CIRCUIT'S DECISION IN ANY WAY CONFLICT WITH THE DECISIONS OF THIS COURT.

It is the position of the City that no important question of federal law is implicated by the Ninth Circuit's decision that the procedures available in Hawaii are facially adequate. In addition, the City believes that the Ninth Circuit's decision is consistent and does not in any way conflict with the decisions rendered by this Court.

A. The Decision By The Ninth Circuit Only Involves The Review Of The District Court's Entry of Summary Judgment.

A district court's entry of summary judgment is reviewed *de novo. T. W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 629 (9th Cir., 1987).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, when a motion for summary judgment is made and supported as provided by the rules, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Plaintiff here did not set forth any genuine issue of material facts to the Ninth Circuit or District, thus leaving none in dispute. The district court applied the applicable law to the undisputed facts.

Defendant moved the District Court for summary judgment and dismissal of the Complaint on the issues of (1) regulatory taking, (2) procedural due process, (3) infringement of contractual rights, and (4) conspiracy. Defendant's motion was supported by Affidavits, as well as statutory references and case authorities. Although Plaintiff submitted a responsive pleading together with an Affidavit of Plaintiff, Defendant contends that the factual matters set

forth in Defendant's Affidavits were not refuted, nor did Plaintiff set forth any legal authority contrary to the position argued by Defendant in said motion.

Pursuant to Rule 56(c), Federal Rules of Civil Procedure ("FRCP"), summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FRCP Rule 56(e) further provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial.* If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. (Emphasis added.)

Upon appeal of the District Court's order granting summary judgment the Appeals Court, upon review of the record of the District Court, must determine whether the District Court erred and there is in fact a genuine issue of material fact underlying the summary judgment and, if not, whether the substantive law was correctly applied. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *United States v. Bissett-Berman Corp.*, 481 F.2d 764 (C.A. 9th, 1973); *United States Steel Corp. v. Darby*, 516 F.2d 961 (C.A. 5th, 1975). On each of the four issues upon which the District Court granted summary judgment, Defendant argues that Plaintiff did not respond as required by the rules of procedure, FRCP Rule 56(e), and did not set forth to the District Court specific facts evidencing the existence of a genuine issue for trial, and that further, there are in fact no material factual issues in dispute and the District Court correctly applied the applicable law.

(A) *Regulatory Taking*

Substantive law warrants the rendering of summary judgment for Defendant on the issue of a regulatory taking. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), the Supreme Court held that a just compensation claim based upon an alleged regulatory taking is not ripe for adjudication in the federal court until 1) plaintiff has sought and received a final decision by the governmental entity charged with implementing the zoning regulation regarding the application of the regulations to the specific property in issue, 473 U.S. at 186, and 2) plaintiff has sought and been denied compensation through State procedures, 473 U.S. at 194. The requirement of a final decision is reasoned by the Court as essential to its evaluation of the economic impact of the challenged regulations and the extent to which it interferes with the reasonable investment-backed expectations of plaintiff. 473 U.S. at 191. The requirement of a final decision also dispels any potential for an administrative resolution through proceedings for variance or waiver. 473 U.S. at 187. To be ripe for federal court adjudication the Court must first have a final definitive determination of the administrative agency which applies the challenged regulations to the property in question. The decision has been reaffirmed in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285, *reh'g denied* _____ U.S. _____, 107 S. Ct. 22, 92 L. Ed. 2d 773 (1986), and in the recent Ninth Circuit decision of *Kinzli v. City of Santa Clara*, 818 F.2d 1499 (9th Cir., 1987).

Under *Hamilton Bank*, a final and authoritative determination requires not only that plaintiff submitted a development plan which was rejected, but also that plaintiff sought variances or waivers which would permit uses not allowed under the regulations. 473 U.S. at 188. In *Yolo County, supra*, the Court noted that land use planning is not an all or nothing proposition, a denial of a desired plan does not equate to a refusal to permit any development on the property. 91 L. Ed. 2d at 293. The refusal to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. 91 L. Ed. 2d at 293. As stated by the Court at footnote 9, 91 L. Ed. 2d at 297, the "rejection of exceedingly grandiose development plans does not

logically imply that less ambitious plans will receive similar unfavorable reviews."

Defendant argues that under the rule of *Hamilton Bank*, Plaintiff's claim based upon the downzoning of Plaintiff's property, of a regulatory taking requiring just compensation under the Fifth Amendment of the United States Constitution (and made applicable to the states under the Fourteenth Amendment of the United States Constitution), was premature based upon Plaintiff's pleadings and the numerous exhibits attached thereto. The District Court had no evidence of, nor did Plaintiff even allege that Plaintiff had submitted a development plan for the property which had been rejected, nor that Plaintiff had sought a perhaps less desired but permissible development plan for approval, nor that Plaintiff had sought any variances or waivers from the application of the zoning regulations. In support of its motion, however, Defendant submitted the Affidavit of Loretta Chee attesting to the fact that a search of the records of both the Zoning Adjustments Branch, which processes applications for variances from the zoning ordinance, and of the Zoning District Changes Branch, which is responsible for the rezoning of land as required by the development plans, and over which the Affiant has supervisory responsibilities, revealed no record of Plaintiff having sought any zoning variance for the subject property from December 23, 1982, when the downzoning to "P-1" preservation was effected by Ordinance No. 82-62, through June 18, 1987. Under *Hamilton Bank*, Plaintiff must show he had sought variances or waivers which would permit uses not allowed under the challenged regulations, otherwise *Hamilton Bank* holds that the claim of regulatory taking must be dismissed as not ripe for adjudication in the federal court.

Defendant accordingly argues that the District Court correctly ruled that there was no genuine issue of material fact and correctly applied the rule of law in determining that Plaintiff's claim for just compensation based upon an alleged regulatory taking was not ripe for federal court adjudication.

(B) *Infringement Of Contractual Rights*

Plaintiff alleged in this action that Plaintiff's deed to the subject property originating from the deed transaction recorded on November 4, 1949 from Thomas Young Yoon to Kam Tai Lee of the

several parcels of the Sunset View Lots tract, constituted a contractual relationship between Plaintiff's predecessor in title and Defendant, of the "AA" residential district zoning for the real property established by Resolution No. 81 of the Board of Supervisors of the City and County of Honolulu on November 24, 1942. Plaintiff contended that the contractual rights inured to Plaintiff by virtue of Plaintiff's purchase of the property and execution of the deed, and payment of real property taxes assessed against the residentially zoned property. Plaintiff acquired the property in 1963.

Plaintiff alleged that the downzoning of the property through adoption of the Development Plan for the Primary Urban Center, Ordinance No. 81-79, and Zoning Map No. 7, Ordinance No. 82-62, violated Plaintiff's constitutional right against infringement of contractual rights and also violated the provisions of HRS Section 46-4. In response, Defendant argues and the District Court so ruled that as a matter of law, Plaintiff had no contractual rights in the perpetuation of the "AA" residential district zoning existing at the time of Plaintiff's acquisition of the property in 1963, nor in 1949 at the time title was acquired by Plaintiff's predecessor in title, nor does HRS Section 46-4 mandate the perpetuation of the zoning designation existing at the time of its enactment in 1957.

The enactment of the zoning resolution in 1942 did not give Plaintiff any right to the perpetuation of the residential zoning set forth therein. As was stated in *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968) at 330:

> The enactment of a zoning ordinance is not a contract with the property owners of the city and confers upon them no vested right to have the ordinance remain forever in force, or to demand that the boundaries of each zone or the uses to be made of property in each zone remain as declared in the original ordinance. Such legislation by the city may be repealed in its entirety, or amended as the city's legislative body determines from time to time to be in the best interests of the public, subject only to the limitations of the enabling statute and the above mentioned limitations of the Constitution. (Citations omitted.)

Nor did Plaintiff's purchase of the property in 1963, which was

subject to an "AA" residential district zoning, create a right to rely on the perpetuation of the zoning. *Town of Largo v. Imperial Homes Corporation*, 309 So. 2d 571, 573 (Fla. App., 1975); *see also Eggebeen v. Sonnenburg*, 239 Wis. 213, 1 N.W.2d 84 (1941). The zoning regulation established for the subject property was not a contract by the Defendant and the zoning was subject to subsequent modification by Defendant. *Reichelderfer v. Quinn*, 287 U.S. 315, 323, 53 S. Ct. 177, 77 L. Ed. 331 (1932).

With respect to HRS Section 46-4 (*see* Appendix A at 1a), which grants the power of zoning to the various counties in the State of Hawaii, the only restrictions set forth therein worthy of discussion here are in subsection (a) and state as follows:

> This section and any ordinances or rules and regulations adopted in accordance with it, shall apply only to those lands not contained within the forest reserve boundaries as established on January 31, 1957, or as subsequently amended.
>
> . . . .
>
> Nothing in this section shall invalidate any zoning ordinances or regulation adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957.

The subject property is not within a forest reserve boundary and there was no allegation by Plaintiff that the property is so situated. Accordingly, though the first clause quoted hereinbefore does restrict Defendant's zoning power, it is not at issue with regard to Plaintiff's property.

The second above-quoted clause of HRS Section 46-4 does not prohibit Defendant from subsequently rezoning lands from designations existing prior to July 1, 1957. The language is clear and there can be no doubt as to its proper construction.

There were no factual disputes presented to the District Court on the issue of infringement of contractual rights. The only matter resting with the Court on this issue was one of law, and Defendant argues that the District Court correctly applied the law to the facts herein, finding as a matter of law, that there was no contrac-

tual relationship between the parties which afforded Plaintiff the right to the continued residential zoning of the subject property.

(C) *Procedural Due Process*

Defendant provided published notification of its intent to adopt Ordinance Nos. 81-79 and 82-62. Ordinance No. 81-79 adopted the Development Plan for the Primary Urban Center, in which the subject property is situated, and Ordinance No. 82-62 adopted Zoning Map No. 7, which established the zoning which implemented portions of the said Development Plan for the Primary Urban Center.

In enacting these ordinances and adopting the Development Plan and Zoning Map No. 7, Defendant has acted in a legislative capacity and not an administrative capacity. These land use regulations constitute general statements of Defendant's policies, rather than specific applications of policy to a particular property owner, and they can only therefore be characterized as legislative acts. *Rogin v. Bensalem Township,* 616 F.2d 680, 693 (3rd Cir., 1980); *Eastlake v. Forest City Enterprises,* 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976).

The distinction between legislative and administrative action is based on the theory that the relatively large numbers affected by the legislative action provide limitations on unreasonable governmental action, in contrast to administrative acts which affect only one or a few individuals. *Rogin, supra,* at 616 F.2d 693. As legislative acts, Defendant argued and the District Court so ruled that Plaintiff is not afforded the constitutional right of procedural due process of having a direct voice in the adoption of these land use regulations. *Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915).

Where the action is legislative, personal notice is not required by the Constitution, and the Ninth Circuit has ruled as a matter of law that the enactment of a general zoning ordinance, such as Defendant's Zoning Map No. 7, Ordinance No. 82-62, is a legislative act. *Kuzinich v. County of Santa Clara,* 689 F.2d 1345 (9th Cir., 1982).

Plaintiff also cites HRS Section 101-20, Notice; Eminent Domain (*see* Appendix A at 5a), as authority for the argument that Plaintiff is entitled to personal notification of Defendant's consideration of the adoption of these land use regulations. Initially Defendant

notes that Plaintiff failed to cite this statutory reference to the District Court in either Plaintiff's memorandum in response to or at the hearing on Defendant's motion for summary judgment and for dismissal of complaint. The statutory reference and Plaintiff's reliance thereon are therefore not a part of the record below and Defendant argues against the propriety of Plaintiff raising the matter for the first time on appeal. *Adickes v. S. H. Kress & Co., supra,* at 398 U.S. 157. Notwithstanding however, Defendant argues that the section is inapplicable hereto and it provides no legal basis for Plaintiff's claim of entitlement to personal notice. HRS Section 101-20 appears as a part of HRS Chapter 101 addressing Eminent Domain, and the language of the section clearly evidences its inapplicability hereto. HRS Section 101-20 states in part as follows:

> When the owner or claimant of the land sought to be *condemned* is known, *the summons* shall be served by delivering to the owner or claimant, or to an agent authorized by appointment or by law to receive service of process, a certified copy thereof, together with a copy of the plaintiff's *complaint.* (Emphasis added.)

As a matter of law, Defendant argues that this statutory provision addresses condemnation actions initiated in court by complaint, and has no applicability to the case herein. No allegation has ever been made that Defendant had filed a condemnation action against Plaintiff for the subject property.

As a matter of law, the constitution does not guarantee personal notice to Plaintiff by Defendant of the Defendant's consideration of the adoption of the land use regulations embodied in Ordinance Nos. 81-79 and 82-62. Accordingly, Defendant contends the District Court correctly applied the applicable law, and even upon consideration of HRS Section 101-20, summary judgment was warranted on this issue, there further being no factual disputes at all.

(D) *Conspiracy*

Plaintiff contended that Plaintiff's property was subject to downzoning to depress the value of the property to Defendant's benefit for future acquisition as a sewage facility. Defendant rebutted this

contention on the ground that the process resulting in the adoption of the Development Plan for the Primary Urban Center, Ordinance No. 81-79, and Zoning Map No. 7, Ordinance No. 82-62, did not consider the property as a future sewage facility. In support thereof, Defendant submitted the Affidavits of Raymond Yamashita and James Honke.

Revised Charter of the City and County of Honolulu 1973 (1984 Ed.) ("RCH") Sections 5-408 and 5-409 describe the General Plan and the Development Plans, respectively. (*See* Appendix B at 6a.) RCH Section 5-408 provides in part that the General Plan shall "set forth the city's broad policies for the long range development of the city." RCH Section 5-409 provides in part that the development plans be "relatively detailed schemes for implementing and accomplishing the development objectives and policies of the general plan within the several parts of the city."

In recommending the redesignation of the subject property to preservation in the Development Plan, Mr. Yamashita by affidavit stated that consideration was made to 1) the population guidelines existing in the General Plan for the Primary Urban Center, 2) the existing residential designation of the property, 3) the lack of improvements on the property, and 4) the steep slope of the property. Mr. Yamashita reviewed planned public facilities for the Primary Urban Center in preparing the Development Plan therefor, and stated that the property was not planned for a public facility nor specifically a sewer facility and that his recommendation for redesignation of the property to preservation was not based upon any knowledge of a planned sewer facility on the property.

The subsequent adoption of Zoning Map No. 7, Ordinance No. 82-62, which affected the land use designation for the Halawa to Pearl City portion of the area embodied in the Development Plan for the Primary Urban Center, is mandated by Defendant's Charter, RCH Section 6-906 (Appendix B at 7a), which provides in part that the Council shall "enact zoning ordinances which shall contain the necessary provisions to carry out the purpose of the general plan and development plans."

The downzoning of which Plaintiff complains originated with the adoption of the Development Plan for the Primary Urban Center, Ordinance No. 81-79, on November 25, 1981, which designated the parcel as preservation. The Affidavits of Raymond Yamashita

and James Honke established that at the time of the preparation of the Development Plan, *i.e.*, prior to November 1981, the parcel was not "master planned" for a sewer facility and was not considered as a future public facility site by Mr. Yamashita in his recommendation of the parcel for the preservation designation.

Plaintiff provided the District Court with no evidence of a conspiracy nor any Affidavits to rebut the statements set forth in the Affidavits submitted by Defendant. Under FRCP Rule 56(e), Defendant argues that Plaintiff was mandated to set forth specific facts evidencing a genuine issue for trial, and in the absence of any disputed factual issues, summary judgment in Defendant's favor was fully warranted on this issue.

In Plaintiff's Brief, Plaintiff cites Ordinance No. 86-96 as support for Plaintiff's claim of a conspiracy. Initially Ordinance No. 86-66 was argued by Plaintiff and is the Defendant's Executive Capital Budget Appropriation Ordinance for the Fiscal Year July 1, 1986 to June 30, 1987. Defendant again argued against the propriety of Plaintiff raising this ordinance citation for the first time on appeal. *Adickes v. S. H. Kress & Co., supra,* at 398 U.S. 157. Plaintiff failed to cite this ordinance to the District Court in either Plaintiff's memorandum in response to or at the hearing on Defendant's motion for summary judgment and for dismissal of complaint. The ordinance reference and Plaintiff's reliance thereon are not a part of the record below. Notwithstanding, Defendant now argues that said Ordinance No. 86-96 fails to raise any issue of material fact and the ruling of the District Court granting summary judgment on the issue of conspiracy is not thereby called into question.

Ordinance No. 86-66 evidences that it was first introduced as a bill to the Council of the City and County of Honolulu on March 5, 1986. The Affidavit of Raymond Yamashita established that in 1979 he was already working on the Development Plan for the Primary Urban Center, which was ultimately adopted as Ordinance No. 81-79 on November 25, 1981. Obviously the actions effected by the adoption of Ordinance No. 81-79 were based upon decisions on facts existing much earlier in time. Although Ordinance No. 86-66 was not cited to the District Court by Plaintiff, even if the Court had considered the legislation, Defendant submits that the appropriation for the planning and design of a sewer system in 1986 does not raise an issue of fact of a conspiracy in

1979, 1980 or 1981. The Affidavit of James Honke established that a sewer pump station was not site designated for any of said years. The Affidavit of Raymond Yamashita established that his recommendation for redesignation of the property was not based upon the existence of any plans for a public facility on the site.

Based upon Plaintiff's failure to submit any evidence to the District Court giving rise to a disputed factual issue, and even upon consideration of Ordinance No. 86-66, Defendant contends that the Court's rendering of summary judgment on the issue of conspiracy was fully warranted under the circumstances.

B. The District Court Did Not Err In Dismissing The Complaint Upon The Determination That All Of The Issues In The Suit Had Been Adjudicated By Summary Judgment.

The District Court's order granting summary judgment addressed four issues, being (1) regulatory taking, (2) infringement of contractual rights, (3) procedural due process, and (4) conspiracy. It appears from Plaintiff's Notice of Appeal filed in the District Court and Plaintiff's Opening Brief, that Plaintiff is raising a claim of the violation of the constitutional guarantee against ex post facto laws. In response, Defendant argues that Defendant is entitled to rely upon Plaintiff's Complaint as setting forth the claims of the lawsuit of Plaintiff against Defendant. *Franklin v. Zuber*, 56 F.R.D. 601 (S.D.N.Y., 1972); *Wong v. Bacon*, 445 F. Supp. 1177 (N.D. Cal., 1977); FRCP 8(a). A reading of Plaintiff's Complaint in the District Court discloses no allegation of a violation of the guarantee against ex post facto laws. Though Plaintiff appeared pro se in the District Court proceeding, he should be held to the same rules of evidence and procedure as those qualified to practice law. *Hutter Northern Trust v. Door County Chamber of Commerce*, 467 F.2d 1075 (7th Cir., 1972). Even a pro se complaint is subject to dismissal if the pleading fails reasonably to inform Defendant of the asserted cause of action. *Brown v. Califano*, 75 F.R.D. 497 (D.D.C., 1977); which also recognized that courts have unhesitatingly dismissed actions where the complaint was "confusing, ambiguous, redundant, vague, and in some respects, unintelligible." 75 F.R.D. at 499.

At the hearing on Defendant's Motion for Summary Judgment and Dismissal of the Complaint, Defendant stated its position that

it believed said motion was dispositive of all of the issues of Plaintiff's Complaint. The District Court made several inquiries of Plaintiff for a concise enumeration of Plaintiff's claims remaining before the Court, following the Court's receipt of the two stipulations withdrawing claims. Following the Court's third inquiry of Plaintiff of what claims remain in his lawsuit, Plaintiff responded, "the right to notice under due process, the Amendment Fourteen of the Constitution, the right to security under obligation to contracts in Article 1, Section 10 of the Constitution, and the right to ex post facto law, in that one need not be diminished by law in Article 1, Section 9 and Section 10 of the Constitution." In argument, Plaintiff's ex post facto claim appeared to resolve into a claim of the violation of the guarantee against infringement of contracts.

The hearing on Defendant's Motion for Summary Judgment and Dismissal of Complaint was held on September 8, 1987. The trial before the District Court was scheduled to commence on September 9, 1987. Plaintiff alleged that the ordinances zoning the subject property are ex post facto laws, being Ordinance Nos. 3234, 81-79, 82-62 and 86-96. Initially Defendant notes that Ordinance No. 81-79 is the Development Plan for the Primary Urban Center, and it designated the subject parcel "preservation." No zoning change was effected by the adoption of the Development Plan. RCH §5-409; *see* Appendix B at 6a. Plaintiff is in error in alleging a downzoning of the property by virtue of Ordinance No. 81-79. Secondly, the constitutional guarantee against ex post facto laws applies only to criminal statutes and forbids the application of new punitive measures to a crime already consummated. *Calder v. Bull*, 3 U.S. 385 (1798); *Lindsey v. Washington*, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937).

The subject parcel is vacant unimproved land. Plaintiff has never alleged that the use of the land is in violation of any of Defendant's prior or current zoning ordinances, and there is therefore no allegation of the application of new provisions to an act already consummated. Assuming further, however, for the sake of argument, that the use of the land was in violation of the provisions of Ordinance No. 3234, the Comprehensive Zoning Code, at the time of its effective date in 1969, or the provisions of Ordinance No. 86-96, the Land Use Ordinance, effective in 1986, both said ordinances specifically provide for the maintenance of uses

existing at the time of the effective date of each said ordinance, as legally nonconforming uses. It is clear, as a matter of law, that Ordinance Nos. 3234 and 86-96 do not invalidate a previously existing use. As such, even if the use of the subject land was prohibited upon the enactment of Ordinance Nos. 3234 or 86-96, neither of said ordinances would allow citation of the property as an illegal use, by virtue of the provisions existing therein for legally nonconforming uses. Accordingly, Defendant argued that there can be no credible argument or facts elicited which would support Plaintiff's claim of an ex post facto law with respect to Ordinance No. 3234 or No. 86-96.

Ordinance No. 82-62 is Zoning Map No. 7 which rezoned the subject parcel from "R-3" residential to "P-1" preservation, effective December 1982. While the ordinance changed the zoning of the subject parcel, the provisions of Ordinance No. 3234, the Comprehensive Zoning Code, continued in effect, first directing the uses permitted for "R-3" residential zoning on the property and then for the "P-1" preservation zoning. The provisions for nonconforming uses in Ordinance No. 3234 continued as well, notwithstanding the adoption of Ordinance No. 82-62, so that even with the downzoning of the subject property effected by Ordinance No. 82-62, Plaintiff would be free to continue the use of the land existing immediately prior to the downzoning, as a legally nonconforming use. Therefore, there can be no credible argument or facts which would support Plaintiff's claim that Ordinance No. 82-62 is an ex post facto law.

III.

THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISIONS IN AFFIRMING THE DISTRICT COURT'S SUMMARY JUDGMENT FOR THE CITY ON THE ISSUES OF (1) REGULATORY TAKING, (2) PROCEDURAL DUE PROCESS, (3) INFRINGEMENT OF CONTRACTUAL RIGHTS, AND (4) CONSPIRACY

A. Regulatory Taking.

This Court has made it clear that a regulatory "taking" claim is not ripe for adjudication unless the claimant has first obtained a final decision regarding the application of the zoning ordinance to the subject property and has utilized the existing state procedures to obtain compensation. *See generally MacDonald, Sommer & Frates v. County of Yolo, supra; Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra.* In this case the Ninth Circuit Court of Appeals ruled that the Toda claim was not ripe for adjudication since Mr. Toda failed to seek State remedies. A review of this Court's decisions indicate that the Ninth Circuit's decision is correct.

In *Hamilton Bank* this Court held that in order for a "taking" claim to be ripe for adjudication, the plaintiff must show that a "final" decision regarding the use and development of the property in question has been rendered and that the plaintiff has no adequate state remedy. The Ninth Circuit, in dismissing the Toda claim, found that Mr. Toda had not availed himself of the available State remedies or shown that the State procedures were not available or inadequate. In this regard, the Ninth Circuit placed the burden on Mr. Toda to show the unavailability or inadequacy of the State remedies. This position is consistent with this Court's determination in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra.*

B. Procedural Due Process.

Plaintiff claimed that he was denied procedural due process because Defendant did not inform him of its zoning changes. This circuit has ruled that the enactment of a general zoning ordinance

is a legislative act, *Kuzinich v. County of Santa Clara, supra,* which does not require procedural due process to anyone affected by it. *Texaco v. Short,* 454 U.S. 516, 531-38 (1982); *O'Neill v. Town of Nantucket,* 711 F.2d 469, 471 (1st Cir., 1983). Therefore, the Ninth Circuit properly found that the zoning ordinances about which Plaintiff complains need not have been preceded by notice to the landowners concerning their implementation.

C. **Infringement of Contractual Rights.**

Plaintiff also argued that his purchase of the property and his payment of property taxes vested in him the right to retain the property, zoned as it was when he first purchased it. The zoning regulations established on Plaintiff's property do not constitute a contract between Honolulu and Toda. Therefore, the zoning remained subject to modification. *See generally Texaco,* 454 U.S. at 532-33.

Therefore, the Ninth Circuit was correct when it held that no constitutional violation of contract had occurred as a result of Honolulu's zoning regulations.

D. **Conspiracy Charges.**

Plaintiff contended that Defendant conspired to downzone his property so that it could later acquire his property at a reduced value for its use as a sewage facility. Defendant submitted the Affidavits of personnel in charge of sewage station development, Yamashita and Honke, stating that they had no knowledge that Honolulu planned on using Toda's property as a sewage pump station. According to Fed. R. Civ. P. 56(e), Plaintiff was required to set forth specific facts in light of these Affidavits. His failure to do so allowed summary judgment on this issue.

E. **Ex Post Facto.**

Finally, Plaintiff presents a new argument on appeal that the zoning laws violated the Constitution in that they were *ex post facto.* The Ninth Circuit Court did hear the claim and held that *ex post facto* laws only prohibit the application of new punitive mea-

sures to a consummated crime. *Lindsey v. Washington, supra* at 402. The court held it was not presented with an *ex post facto* claim involving a crime.

CONCLUSION

The Ninth Circuit properly affirmed the District Court's Order Granting Summary Judgment on the issues of (1) regulatory taking, (2) infringement of contractual rights, (3) procedural due process, and (4) conspiracy on the grounds that the District Court correctly determined that there was no genuine issue of any material fact and that the substantive law was correctly applied.

As this Court has consistently held with regard to the regulatory taking claim, if a claim is not ripe for adjudication, the Court lacks jurisdiction in the case. The Ninth Circuit properly held that Mr. Toda's claims for regulatory taking were not ripe for adjudication since he had not shown that the State remedies were inadequate or unavailable. Lastly, Mr. Toda should not be permitted to avoid the established procedures available in Hawaii and the City Charter to obtain the relief he is seeking. The City therefore respectfully requests this Court to deny the Petition for Writ of Certiorari.

DATED: Honolulu, Hawaii, July 25, 1989.

Respectfully submitted,

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APPENDIX

APPENDIX A

Hawaii Revised Statutes (1985)

§46-4 County zoning. (a) This section and any ordinances or rules and regulations adopted in accordance with it, shall apply to those lands not contained within the forest reserve boundaries as established on January 31, 1957, or as subsequently amended.

Zoning in all counties shall be accomplished within the framework of a long range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner. Zoning in the counties of Hawaii, Maui, and Kauai means the establishment of districts of such number, shape, and area, and the adoption of regulations for each district as shall be deemed best suited to carry out the purposes of this section. In establishing or regulating the districts, full consideration shall be given to all available data as to soil classification and physical use capabilities of the land so as to allow and encourage the most beneficial use of the land consonant with good zoning practices. The zoning power granted herein shall be exercised by ordinance which may relate to:

(1) The areas within which agriculture, forestry, industry, trade, and business may be conducted.

(2) The areas in which residential uses may be regulated or prohibited.

(3) The areas bordering natural watercourses, channels, and streams, in which trades or industries, filling or dumping, erection of structures, and the location of buildings may be prohibited or restricted.

(4) The areas in which particular uses may be subjected to special restrictions.

(5) The location of buildings and structures designed for specific uses and designation of uses for which buildings and structures may not be used or altered.

(6) The location, height, bulk, number of stories, and size of buildings and other structures.

(7) The location of roads, schools, and recreation areas.

(8) Building setback lines and future street lines.

(9) The density and distribution of population.

(10) The percentage of lot which may be occupied, size of yards, courts, and other open spaces.

(11) Minimum and maximum lot sizes.

(12) Other such regulations as may be deemed by the boards or city council as necessary and proper to permit and encourage orderly development of land resources within their jurisdictions.

The council of any county shall prescribe such rules and regulations and administrative procedures and provide such personnel as it may deem necessary for the enforcement of this section and any ordinance enacted in accordance therewith. The ordinances may be enforced by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.

Any civil fine or penalty provided by ordinance under this section may be imposed by the district court, or by the zoning agency after an opportunity for a hearing, pursuant to chapter 91. Such a proceeding shall not be a prerequisite for any injunctive relief ordered by the circuit court.

Nothing in this section shall invalidate any zoning ordinances or regulation adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957.

The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in

accord with a long range, comprehensive, general plan, and to insure the greatest benefit for the State as a whole. This section shall not be construed to limit or repeal any powers now possessed by any county to achieve the ends through zoning and building regulations, except insofar as forest and water reserve zones are concerned and as provided in subsections (c) and (d).

Neither this section nor any ordinance enacted under this section shall prohibit the continuance of the lawful use of any building or premises for any trade, industry, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the ordinance takes effect; provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single family or duplex) or agricultural uses. Nothing in this section shall affect or impair the powers and duties of the director of transportation as set forth in chapter 262.

(b) Any final order of a zoning agency established under this section may be appealed to the circuit court of the circuit in which the land in question is found. The appeal shall be in accord with the Hawaii rules of civil procedure.

(c) Each county shall adopt reasonable standards to allow the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted; provided:

(1) All applicable county requirements, not inconsistent with the intent of this subsection, are met, including building height, setback, maximum lot coverage, parking, and floor area requirements;

(2) The county determines that public facilities are adequate to service the additional dwelling units permitted by this subsection; and

(3) Construction of the second dwelling is otherwise in accordance with applicable zoning ordinances and rules, and general plan and development plan policies.

Nothing in this section shall supersede any recorded covenant or deed restriction that prohibits the construction of a second dwelling on a lot.

After receiving notice that a permit has been granted pursuant to this subsection, the applicant, once a week, for two consecutive weeks, shall publish a notice in a newspaper of general circulation in the area stating the applicant's name and address of the property, and notifying the public that the permit has been obtained. No construction shall be initiated until the last of the notices has been published. If the applicant fails to publish the notices, and constructs the unit, and a covenant or deed restriction exists that would have precluded the construction of the second unit, any person or entity who successfully brings an action for violation of the covenant or deed restriction shall be entitled to reasonable attorney's fees and costs.

This subsection shall not apply to lots developed under planned unit development, cluster development, or similar provisions which allow the aggregate number of dwelling units for the development to exceed the density otherwise allowed in the zoning district.

Each county shall establish a review and permit procedure necessary for the purposes of this subsection.

(d) Neither this section nor any other law, county ordinance, or rule shall prohibit group living in facilities with eight or fewer residents and which are licensed by the State as provided for under section 321-15.6 or in intermediate care facilities for the mental retardation (ICF/MR-C) for persons, including the mentally ill, the elderly, the handicapped, the developmentally disabled, or the totally disabled persons, who are not related to the home operator or facility staff; provided that such group living facilities meet all applicable county requirements, not inconsistent with the intent of this subsection and including building height, setback, maximum lot coverage, parking, and floor area requirements. For purposes of this section, "mentally ill person" means a

mentally ill person as defined under section 334-1; "elderly person" means an elderly person as defined under section 201E-230; "handicapped person" means an individual with a physical handicap as defined under section 515-2; "developmentally disabled person" means a person suffering from developmental disabilities as defined under section 333E-2; "totally disabled person" means a person totally disabled as defined under section 235-1; and "intermediate care facility/mental retardation-community (ICF/MR-C)" is defined as an identifiable unit providing residence and care for eight or fewer mentally retarded individuals. Its primary purpose is the provision of health, social and rehabilitation services to the mentally retarded through an individually designed active treatment program for each resident. No person who is predominately confined to bed shall be admitted as a resident of such a facility.

§101-20 Notice. When the owner or claimant of the land sought to be condemned is known, the summons shall be served by delivering to the owner or claimant, or to an agent authorized by appointment or by law to receive service of process, a certified copy thereof, together with a copy of the plaintiff's complaint. If the owner or claimant, although known, was never a resident of the State or has removed therefrom or cannot for any reason be served with process within the State, or if the owner or claimant is unknown, then the service of the summons upon the owner or claimant may be made in the manner provided by sections 634-23, 634-24, and 634-26. If the defendants are joined in the complaint by describing them as a class, then the service of the summons upon the defendants may be made by publication in a newspaper of general circulation in the county in which the property is situated, in the manner provided by sections 634-23(3) and 634-26, and by giving such further notice as the court may order. The service of summons, as provided for in this section, shall be sufficient to give the court jurisdiction to proceed with and finally determine the case.

APPENDIX B

Revised Charter of the City and County of Honolulu 1973 (1984 Ed.)

Section 5-408. General Plan — The general plan shall set forth the city's broad policies for the long range development of the city. It shall contain statements of the general social, economic, environmental and design objectives to be achieved for the general welfare and prosperity of the people of the city through government action, city, State or federal. The statements shall include, but not be limited to, policy and development objectives to be achieved with respect to the distribution of social benefits, the most desirable uses of land within the city, the overall circulation pattern and the most desirable population densities within the several areas of the city.

Section 5-409. Development Plans — "Development plans" mean relatively detailed schemes for implementing and accomplishing the development objectives and policies of the general plan within the several parts of the city. A development plan shall include a map of the area of the city to which it is applicable; shall contain statements of standards and principles with respect to land uses within the area for residential, recreational, agricultural, commercial, industrial, institutional, open spaces and other purposes and statements of urban design principles and controls; and shall identify areas, sites and structures of historical, archaeological, architectural or scenic significance, a system of public thoroughfares, highways and streets, and the location, relocation and improvement of public buildings, public or private facilities for utilities, terminals and drainage. It shall state the desirable sequence for development and other purposes as may be important and consistent with the orderly implementation of the general plan.

Development plans may contain statements identifying the present conditions and major problems relating to development, physical deterioration and the location of land uses and the social, economic and environmental effects thereof; may show the projected nature and rate of change in present conditions for the rea-

sonably foreseeable future based on a projection of current trends; and may forecast the probable social, economic and environmental consequences of such changes.

Section 6-906. Zoning Ordinances — The council shall, after public hearings, enact zoning ordinances which shall contain the necessary provisions to carry out the purpose of the general plan and development plans. In enacting the ordinances, the council shall take into consideration the character of the several parts of the city and their peculiar suitability for particular uses and types of development with a view to encouraging the most appropriate use of land throughout the city. The ordinances shall contain reasonable standards with respect to the location, height, bulk, size of buildings and other structures, the area of yards, courts, off-street parking spaces and facilities and other open spaces, the density of population, and the use of buildings, structures and land for trade, industry, business, residence or other purposes.